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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellants,
v.
MAURICE S. HEPPS, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF AMICUS CURIAE OF PRINT AND BROADCAST MEDIA AND ORGANIZATIONS † IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI

The *amici curiae* submitting this brief include a wide variety of entities representing all forms of the news media—print, radio, and television. They range in size from large broadcasting and print organizations, such as the American Broadcasting Company, the Associated Press, and Cable News Network, Inc., to a small weekly newspaper (*The Highlander*, published by Highland Publishing Company in Marble Falls, Texas) with a circulation of 9,561. The *amici* obviously have a direct interest in the outcome of this appeal, which will determine whether states can constitutionally place the burden of proving truth on a media defendant in a private person case involving public issues.

As we demonstrate in this brief, the problems faced by the media in this type of litigation are not only legal in nature but extremely practical—problems which *amici* must face every day in the newsroom and in the courtroom. Because the Appellants and the other *amici* have concentrated primarily on the legal issues involved, this brief focuses on those practical and pragmatic considerations which might not otherwise come to the Court's attention. And since the public is not represented in this appeal, *amici* further demonstrate that the ultimate ramifications of the concerns expressed here will be that the uninhibited flow of information to the public will be threatened—an interest at the core of the First Amendment.

The parties have consented to the filing of this Brief.

STATEMENT OF THE CASE

We adopt the Statement of the Case set forth by Appellants in their Brief, as supplemented by certain facts added in the Argument below.

SUMMARY OF ARGUMENT

In addition to the legal principles set forth by Appellants and the other *amici* that argue persuasively for placing the burden of proof as to falsity on the plaintiff in a media case involving public issues, there are strong practical considerations calling for the same result.

The limited protections envisaged by *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), have proven illusory. Most states have adopted negligence standards for determining fault, and the ground rules for establishing negligence are so loose that juries can and do assume that fault flows from falsity. Under the rule adopted below—that the burden of proving truth is on the defendant—there is, in fact, a presumption of falsity. This is because: jurors are usually instructed, as they were in this case, (a) that they can find fault only after finding falsity; and (b) that they can consider a wide-ranging number of elements in determining fault. Thus, in practice, jurors are allowed to apply a rule of strict liability once they may presume that a defamatory publication is false. The situation is particularly egregious because defamation is defined in extremely broad terms in most states. Therefore, any media reporting "bad news" is susceptible to the enormous expense of time and resources in defending a defamation action, with the added threat of not being able to prove to a jury's satisfaction that its statements were true.

Under the rule below, it will be no simple matter for a media defendant to establish "truth," because many states in private person cases (as opposed to public official/figure cases) have imposed on the defendant the burden of proving all adverse implications, inferences and innuendos arising out of the reporting of true facts. In this case, for example, the trial court told the jury five times that the statements published by defendants, even if literally true, could be held defamatory if they conveyed a false and defamatory meaning by implication and innuendo. This poses enormous problems for the press, and especially for small media that do not have the benefit of oversight counsel, in determining not only what some people may take a publication to mean, but how the truth of all of these inferences can be proven in court. The myriad questions of law that are involved in *proof*—particularly proof of inferences—will force many media to forego the publication of important, newsworthy stories.

Juries are already confused by libel instructions, and the application of the rule below will add a new element of confusion. Inevitably, the facts as to falsity will bear on the facts as to fault, and to tell a jury that one party has the burden as to falsity but that the other bears it as to fault is to create an unrealistic expectation of what a jury can absorb and apply. Moreover, in a close case the placement of the burden of proof may be determina-

tive, for by allocating that burden the trial court effectively decides each issue of fact which the jury is unable to decide. Thus, as a practical matter the result in certain cases is to impose liability without fault.

There is bound to be a resulting "chilling effect" on the press if the burden of proof as to truth is on the defendant. This self-censorship will be undertaken by both large and small media, although in some instances for different reasons. Even where a publisher is confident of the truth of the story, the risk of not being able to carry the burden of proving truth, combined with the already enormous costs of litigation, will often dissuade the media from publication. When this occurs—and it will if the lower court's ruling is affirmed—the ultimate loser will be the public.

ARGUMENT

Appellants and other *amici curiae* deal in some detail with the case law applicable to this lawsuit, from *New York Times* v. *Sullivan* 376 U.S. 254 (1964), through *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and its progeny. They correctly argue that imposing the burden of proving truth on the media defendant in a private person case involving public issues violates both the First Amendment and due process of law. They set forth the legal principles from a great variety of cases, with special emphasis on *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), and *Speiser* v. *Randall*, 357 U.S. 513 (1958). They further point out that falsity is an essential element of a defamation action and that there are strong reasons for not assuming that defamatory speech is false. Finally, they assert that it is not unfair to place the burden of proving falsity on the plaintiff, that there are many analogous situations in the law where plaintiffs in fact carry that burden, and that the effect of the contrary ruling below penalizes fully protected truthful speech.

What has not been stressed, however, are some of the important practical aspects of how the Pennsylvania rule (*i.e.*, placing the burden of proving truth on the defendant), if approved by this Court, will actually work in the state and federal courts. When these pragmatic considerations are taken into account,[1] it becomes even more apparent that the operation of the rule will result in an undue and unfair burden on the press, as well as a self-censorship that is incompatible with the free and uninhibited flow of information to the public. Such results are contrary to the purpose and protections of the First Amendment and should not be approved by this Court.

1. *The Negligence Standard Offers Little Protection.*

Gertz, insofar as relevant here, established two basic rules affecting private person cases in which public issues are discussed by the media: (1) the states are not bound by the actual malice standard, but instead are free to adopt lesser standards of liability; however, (2) the states may not impose liability without fault. Through these two rulings, the Court recognized that in order to preserve a free flow of information to the public, the media must be afforded some degree of liability protection, though not necessarily the degree accorded under the higher *Sullivan* standard. The Court apparently assumed that by requiring at least *negligence* to be shown and by allowing liability to be imposed only for false speech, the press and the First Amendment would receive all the protection needed.

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[1] In a variety of situations, the Court has taken practical considerations into account in reaching its judgments. *E.g.*, *Wilson* v. *Garcia*, 53 U.S.L.W. 4481, 4484 (U.S. April 17, 1985); *Bennett* v. *New Jersey*, 53 U.S L.W. 4337, 4339 (U.S. March 19, 1985); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 865 (1982); *Addington* v. *Texas*, 441 U.S. 418, 427-431 (1979); *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925).

In actual practice, however, the limited *Gertz* protections have proven to be illusory, and if the additional burden of establishing truthfulness is now to be imposed on the media defendant, the goals sought by the Court in *Gertz* will be defeated altogether.

In the eleven years since *Gertz*, at least three-fifths of the states have responded by adopting some degree of negligence as the proper standard for fault, most of the remaining states have not definitively ruled on the matter, and only four have required that actual malice be shown.[2] Not surprisingly, due to the lesser protections afforded them, *Gertz* defendants have fared more poorly than *Sullivan* defendants at the hands of juries and judges.[3] What is more disturbing, however, is that negligence standards adopted pursuant to *Gertz* have proven to provide little protection at all to media defendants, for in practice jurors can and do impose liability on the media where no negligence exists.[4] The reason for this, as we demonstrate below, is that the ground rules for determining negligence are so loose that jurors often assume that negligence necessarily flows from a

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[2] *See Miami Herald Pub. Co.* v. *Ane*, 423 So.2d 376, 385-386 n. 3 (Fla. Dist. Ct. App. 1982), *aff'd*, 458 So.2d 239 (Fla. 1984), and cases there cited; *Gazette, Ind.* v. *Harris*, 325 S.E.2d 713, 726 n. 3 (Va. 1985), *cert. denied*, 105 S.Ct. 3513 & 3528 (1985), and cases there cited; Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 Comm/Ent L. J. 259, 264-265 (1984); Collins & Drushal, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 Case W. Res. L. Rev. 306 (1978).

[3] Several studies have demonstrated this to be so. Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 Am. B. Found. Research J. 795, 824-825; Libel Defense Resource Center ("LDRC") Bulletin No. 6, 41-43 (1983); LDRC Bulletin No. 11, 20-21 (1984); LDRC Bulletin No. 12, 7 (1984); Franklin, *supra* note 2, at 272-281. "This failure [of the negligence standard established in *Gertz*] is so clear and so serious that it alone should justify renewing the search for acceptable standards in libel cases." *Id.* at 281.

[4] *See generally* L. Tribe, *American Constitutional Law* 646 (1978); Franklin, *supra* note 2, at 272-273.

finding that the defendant has published a false defamation, and, of course, under the Pennsylvania rule, falsity is presumed.

Normally, instructions to the jury *begin* with the issue of truth or falsity, because if the statement is true, a verdict must be returned for the defendant.[5] Hence, in practice, jurors never reach the question of negligence unless they have determined a communication to be false. Moreover, negligence, and therefore fault, are defined to the jury in terms of falsity. An example is this very case, where the trial court did not instruct on the issue of fault until it had first instructed on the issue of falsity, and where the jurors were told not to decide fault until they had decided falsity. Thus, the court's instruction was that if the contested statements were found to be true, the defendant was not liable (JA A99), but if the statements were found to be false, "you will then consider the seventh element of the action in libel—the element of fault on the part of the defendants." JA A100. On that "element of fault," the jurors were allowed to consider a wide-ranging number of elements, including "whether a reasonably prudent person would have acted as the defendants did in investigating and publishing the articles, given the circumstances of this case." JA A104-A105. They were further told that "[t]he thoroughness of the check that a reasonable person would make before he published the article may vary with the play and interplay of these factors." JA A105.

In other words, the jury was free to determine the negligence issue based on very little more than a finding of falsity. Under instructions like these, it is all too easy for a jury to conclude that falsity necessarily denotes negligence—or, stated conversely, that absent negligence,

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[5] *See, e.g., Martin* v. *Griffin Television, Inc.*, 549 P.2d 85, 94 (Okla. 1976).

there could have been no false publication. Under such circumstances, a jury will likely reason that regardless of what was done, the error would have been caught and corrected if something *more* had been done. And the fact that something more *should* have been done follows naturally from the fact that something false was published. This line of reasoning in practice amounts to a rule of strict liability once the jury is allowed to presume that a defamatory publication was false.

This predisposition toward fault-finding would not be so serious if appellate courts were capable of ferreting out instances of over-zealousness in regard to negligence and were prepared to reverse on that ground. However, one study of such appellate reviews disclosed but a single reported case in which a finding of negligence was even a factor in reversal and found not one case tried under a negligence standard in which a verdict or judgment for the plaintiff was reversed solely because the finding of negligence was erroneous.[6] The same was found true in a study of cases involving defense motions for summary judgment—negligence is such a loose standard that virtually no motions are won on this issue.[7]

If the negligence standard as interpreted by the lower courts in substance adds essentially nothing to the case, and a finding of negligence is virtually unreviewable, a state has, as a practical matter, imposed a standard of strict liability. A defamatory statement that is presumed to be false thus subjects the defendant to liability without any further proof. However, where the burden is on the plaintiff to prove falsity, there is at least a requirement of something more than a defamation and the filing of a complaint before a recovery is allowed against a media defendant that is unable, for whatever

[6] LDRC Bulletin No. 6 at 42-43.

[7] LDRC Bulletin No. 12 at 7.

reason,[8] to prove truth. Shifting the burden on the issue of truth to the defendant not only exacerbates the practical imposition of strict liability but eliminates all constraints against groundless suits.

It is a common misconception that all libel plaintiffs sue for compensation for harm incurred or to clear their names. In fact, many sue for revenge, to harass, to intimidate, to obviate future unfavorable stories, or to recover a "windfall."[9] It has been estimated that as many as half of all defamation suits are "nuisance" suits, with no hope of recovery.[10] In the light of these facts, there is something fundamentally unfair about a general presumption that the defendant has acted wrongfully by speaking falsely merely on the basis of the filing of a complaint; "it runs counter to our usual assumption that a defendant has acted properly unless and until it is proven otherwise."[11] It is all too easy to file a complaint if it carries few burdens with it, and it is all too difficult to defend against such a complaint where the most important and difficult burden in the case is on the defendant.

Moreover, not even the requirement that the publication be defamatory offers much protection. This is because there are very few news reports that do not ad-

[8] For example, evidence necessary to prove truth may be solely in the hands of, or under the effective control of, the plaintiff. *See also* note 30, *infra*, and accompanying text.

[9] *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. Rev. 1, 5 (1983); Massing, *The libel chill: How cold is it out there?*, Colum. Journalism Rev., May/June 1985, at 31, 33 (1985); Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 435 (1975); *Herbert* v. *Lando*, 441 U.S. 153, 204-205 (1979) (Marshall, J., dissenting).

[10] *See* Riley, *Fighting Back: What Redress Media Have Against Frivolous Libel Suits*, 59 Journalism Q. 566 (1982), as updated by Franklin, *supra* note 9, at 6 n. 27.

[11] R. Sack, *Libel, Slander, and Related Problems* 136 (1980).

versely impact upon someone, and the definitions of defamation in most states are so loosely worded that almost any adverse statements qualify as defamation. For example, in Pennsylvania, a statement is defamatory "'if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him'." *Vitteck* v. *Washington Broadcasting Co.*, 256 Pa. Super. 427, 389 A.2d 1197, 1200 (1978), quoting *Birl* v. *Philadelphia Electric Co.*, 402 Pa. 297, 167 A.2d 472, 475 (1960). Similarly, in Illinois a statement is defamatory if it "impeaches a person's integrity, virtue, human decency, respect for others or reputation and thereby lowers that person in the estimation of the community or deters third parties from dealing with that person." *Newell* v. *Field Enterprises*, 91 Ill. App.3d 735, 415 N.E. 2d 434, 440, 47 Ill. Dec. 429 (1980), *modified on other grounds*, *Chapski* v. *Copley Press*, 92 Ill.2d 344, 442 N.E. 2d 195, 65 Ill. Dec. 884 (1982). Under such standards media defendants subject to the Pennsylvania rule may be deprived of First Amendment protections altogether. Indeed, unless the Pennsylvania rule is repudiated, the practical result under many states' relaxed negligence and defamation standards may be jury verdicts against media defendants who simply report bad news.

2. *The Problems of Foreseeability and Proof of Innuendo.*

Much has been written in this case about the ability of one side or the other to prove truth, or the fairness of placing on one side or the other the burden of proving or disproving truth. But "truth" in a defamation case concerns more than the simple offering of clear and convincing evidence as to particular facts. Rather, whoever carries the burden of proof must also address all inferences that might reasonably be drawn from those facts —a formidable task not only in respect to evidence but, more importantly, in respect to foreseeing in advance of publication the possible inferences that later might also have to be supported by proof.

Many state courts have drawn a sharp distinction in this regard between public official/figure and private person cases. Where the plaintiffs are public official/figures, there can be no liability for inference or innuendo once the published facts have been proven true. *See, e.g.*, *Strada* v. *Connecticut Newspapers, Inc.*, 193 Conn. 313, 477 A.2d 1005, 1010-12 (1984), and cases there cited. As the *Strada* court held, "[t]he media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory *implication* arising from the report of those true facts." *Id.* at 1012; emphasis added.

And yet precisely the opposite is true in private person cases; defendants can be and have been held liable for implications, inferences and innuendos arising out of the reporting of true facts. In Pennsylvania, for example, a finding of falsity may be based on a false inference drawn from true statements.[12] In a recent Pennsylvania case, the defendant newspaper had to prove not only the truth of statements in an article about a son committing suicide (such as the fact that he shot himself with a rifle belonging to his father) but also the truth of the *implication* that the father in some fashion caused the suicide. *Rutt* v. *Bethlehems' Globe Pub. Co.*, 484 A.2d 72, 76-77 (Pa. Super. 1984).[13] In this very

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[12] *E.g.*, *Bogash* v. *Elkins*, 405 Pa. 437, 176 A.2d 677 (1962); *Sarkees* v. *Warner-West Corp.*, 349 Pa. 365, 369, 37 A.2d 544, 546 (1944).

[13] In Pennsylvania, for purposes of the threshold determination of whether a communication could have been understood as defamatory, it is not necessary that the communication actually caused harm; its defamatory character "depends on the general tendency of the words to have such an effect." *Agriss* v. *Roadway Express, Inc.*, 483 A.2d 456, 461 (Pa. Super. 1984). Moreover, the fact that the communication is subject to an innocuous interpretation or that the author had an innocent intention does not defeat the right of action. *Id.* at 462; *Brophy* v. *Philadelphia Newspapers, Inc.*, 281

case, the trial court told the jury not once but five times that the statements published by defendants, even if literally true, could be held defamatory if they conveyed a false and defamatory meaning by implication and innuendo.[14] A defendant who has the burden to prove "truth" in such a setting not only has an unfair evidentiary burden but, more importantly, is saddled with such a weight on its stories—that is, the need to foresee how some reader may *misconstrue* true statements—that some of those stories may never be released to the public at all.

The same type of "sting" rule as to inferences obtains in other states. In a Tennessee case, for example, where

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Pa. Super. 588, 422 A.2d 625 (1980); *Raffensberger* v. *Moran*, 485 A.2d 447, 451 (Pa. Super. 1984); *Zartman* v. *Lehigh County Humane Soc'y*, 482 A.2d 266, 269 (Pa. Super. 1984).

[14] JA A99-A100:

> Nevertheless, although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implications and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.
>
> Once again: Although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implication and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.
>
> The proof of falsity thus must be directed at the gist or sting of the defamation. The test is whether the alleged libel, as published, would have a different effect on the mind of the reader than the truth would have produced.
>
> Remember again, if defamatory implications and innuendo produced by an article are false, the literal truth of each fact asserted in the article will not render the article true where the article read in its entirety implies additional defamatory statements.
>
> In order to carry their burden with respect to the sixth element, then, the plaintiffs must prove by a fair preponderance of the evidence either that a defamatory statement in an article was false, or that while true, the statements in an article conveyed a defamatory meaning by implication and innuendo, which defamatory meaning was false.

the burden was on the defendant newspaper to prove truth, it was held not to be a defense that *every statement* in the article was true and correct. Since the ordinary reader could have inferred an additional, adverse *meaning* from the article, the newspaper had to prove the truth of that *meaning*. *Memphis Pub. Co.* v. *Nichols*, 569 S.W. 2d 412, 418-420 (Tenn. 1978). Throughout these rulings, the state courts have imposed a different, more all-encompassing type of duty upon the defendant in a private person case than in a public official/figure case.[15] Thus, it will not be enough for a media defendant who bears the burden of proof simply to prove the truth of the relevant facts; it must also prove the truth of inferences, implications, and innuendos that can be drawn from those facts.

A *per se* defamatory publication is presumed to have been understood in a defamatory sense, but when a publication is susceptible to an innocent as well as a defamatory interpretation, the plaintiff is required in some states to prove the defamatory meaning because there is no basis for any presumption.[16] Yet these assumptions

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[15] *Compare, e.g., Madison* v. *Bolton*, 234 La. 997, 102 So.2d 433, 438 (1958) (in a private person case, "if the words used, when taken in their ordinary acceptation, convey a degrading imputation, no matter how indirectly, they are libelous—it matters not how artfully their meaning is concealed or disguised"), *with Schaefer* v. *Lynch*, 406 So.2d 185, 188 (La. 1981) (*Bolton* ruling is correct but not applicable to public officials). The Washington Supreme Court, in holding against a broadcaster in a private person defamation case, has said that the plaintiff may recover upon a showing that *"the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respects."* *Taskett* v. *King Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81, 85 (1976) (emphasis in original).

[16] *See* Spiegel, *Defamation by Implication—In the Confidential Manner*, 29 S. Cal. L. Rev. 306, 312 (1956).

are stood on their head in states like Pennsylvania, where the plaintiff is not required to be put to any proof in this regard, and the defendant must establish the truth of each adverse interpretation that the jury could legitimately draw. Since "[i]t is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts * * *," [17] the question of who bears the burden of proof in relation to inferences becomes vital.

Moreover, it must be remembered that while a plaintiff need only read or hear what has been published about him and allege the inferences that he believes others have drawn from the statement, the media defendant, if it carries the burden imposed by Pennsylvania, must *foresee* all adverse inferences that may ultimately be drawn from the statements and either eliminate them from the communication or prove them true. Thus, the California Supreme Court, in a case deciding that a defendant is liable for what is insinuated as well as for what is stated explicitly, went so far as to say that "[t]he language used may give rise to conflicting inferences as to the meaning intended, but when it is addressed to the public at large, it is reasonable to assume that at least some of the readers will take it in its defamatory sense." [18] Such a rule may be fair and practical so long as the plaintiff is required to prove the

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[17] *S.J. Groves & Sons Co.* v. *Ohio Turnpike Comm'n*, 315 F.2d 235, 237 (6th Cir.), *cert. denied*, 375 U.S. 824 (1963).

[18] *MacLeod* v. *Tribune Pub. Co.*, 52 Cal.2d 536, 343 P.2d 36, 43 (1959). *See also Herrmann* v. *Newark Morning Ledger Co.*, 48 N.J. Super. 420, 138 A.2d 61, 71-72, *aff'd on rehearing*, 49 N.J. Super. 551, 140 A.2d 529, 530 (1958), where the court stated that even though an article does not impute defamatory meaning on its face, and even though a majority of people would not derive a defamatory meaning from it, the defendant carries the burden of proving the truth of the defamatory implications that some people will derive from it.

falsity of the particular inference he drew, but if that burden is on the media defendant, the scope of the burden is almost limitness.[19]

Indeed, under that approach a defendant might publish a statement about the plaintiff which was not defamatory on its face but was defamatory only because of facts known to the plaintiff and his intimates. The question whether the defendant should have discovered those facts would be then left to a jury, along with the question whether the defendant had proved the truth of connotations of which it may not have been aware when it published the statement. To require that the defendant have the full burden of proof as to such "truth," particularly where the plaintiff's complaint may not be specific about the sense in which the statements were deemed to be defamatory, is both unfair and unrealistic. It places too heavy a burden on the media defendant under the First Amendment. As one commentator has put it: "It would be only too easy for a jury to conclude that *someone* at the newspaper should have known of the latent ambiguity or hidden fact. The only way to avoid such a result is to require the plaintiff to establish that the media defendant was aware of the defamatory meaning at the

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[19] Courts are already mired in the kinds of determinations involved in *Greenbelt Coop. Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 11-14 (1970), where this Court had to decide whether the word "blackmail" could have been understood by a reader in the sense alleged by the plaintiff. This type of problem will be greatly exacerbated if the burden of proving the truth of all inferences is on the defendant, because the defendant not only will be forced to prove that the inferences alleged by the plaintiff could not be inferred by reasonable people but also that, if those unintended inferences could be drawn, they are, in fact, true. In an already confused atmosphere, the jury will thus be further misled by the alternative, contradictory positions forced upon the defendant. It makes much more sense to place the ultimate burden of persuasion on the plaintiff, thus leaving a defendant free to interpose truth as an affirmative defense.

time the statement was uttered." [20] And this burden, of course, is inextricably intertwined with that of truth or falsity.

Under the Pennsylvania rule, there is still a further complication. In some states, ambiguous language must be pleaded by the plaintiff so as to indicate that the words were understood in a defamatory sense—that the position or opinion of the readers was such that they derived a defamatory meaning from them.[21] Can this burden also be shifted to the media defendant, so that it must prove, in an ambiguous language case, that readers could not have understood the words as defamatory or derived a defamatory meaning from them? Such a burden would appear to be intolerable, and yet it flows naturally from the Pennsylvania rule in those states where the plaintiff can plead the defamation in general terms.

Although this Court announced in *Gertz* that it might take into account "somewhat different" considerations if a statement's content "did not warn a reasonably prudent editor or broadcaster of its defamatory potential" (418 U.S. at 348), it is not at all clear how such considerations can be taken into account in practice. For example, there obviously would be serious difficulties in reversing a jury's finding, approved by a state court following its own standards, that (a) a reasonably prudent editor or broadcaster *should* have foreseen all innuendos, and (b) the editor or broadcaster failed to carry its burden of proving the truth of those innuendos. In such a case, at the very least the Court would have to establish two categories of "fact"—direct facts, which the defendant carries the burden of proving, and facts

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[20] Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 844 (1984) (emphasis in original).

[21] This is true, for example, in California. *E.g.*, *Peabody* v. *Barham*, 52 Cal. App.2d 581, 126 P.2d 668, 670 (1942), *modified in MacLeod* v. *Tribune Pub. Co.*, *supra*.

by inference, which the plaintiff carries the burden of disproving. Whether this dichotomy would be workable, in view of the maze of variations on the "fact" theme now extant in the states, is problematical at best.[22]

If the Pennsylvania Supreme Court ruling stands, media defendants will bear the burden of proving the truth of any and every adverse implication, inference or innuendo that some people might derive from published statements. Not only is such a rule unfair and unworkable, but the spectre of the rule, with its attendant media burden of foreseeing myriad reader or listener interpretations of its statements and how they might be proved true, will chill many statements, to the ultimate detriment of the public.

3. *The Issues of Jury Confusion.*

Juries are already confused by instructions in libel cases,[23] and the application of the Pennsylvania ruling will add a new element of confusion that threatens a vigorous, outspoken press.

Appellants and other *amici* persuasively urge the express adoption of the legal concept, derived from *Time, Inc.* v. *Firestone*, 424 U.S. 448, 458 (1976), that falsity is an element of fault. We agree with their arguments in favor of such a doctrine but write separately because the difficulty of separating for a jury the elements of fault from the elements of falsity has great practical import.

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[22] Franklin & Bussel, *supra* note 20, at 828-834; *Greenbelt Coop. Pub. Ass'n* v. *Bresler*, 398 U.S. at 22, 23 (White, J., concurring).

[23] *See, e.g.*, Brill, *Inside the Jury Room at the Washington Post Libel Trial*, Am. Law., Nov. 1982, at 1; Taylor, *Libel Law: A Tough Puzzle for Trial Jury*, N.Y. Times, May 5, 1983, at B15, col. 1; Franklin, *supra* note 9, at 8.

As we have noted, while it is theoretically true that a defendant can act reasonably or be "non-negligent" in publishing an untrue libelous statement, it is going to be extraordinarily difficult for a jury to believe it. First, in the minds of many jurors, reasonable care is closely associated with and often dependent upon a determination of truth or falsity. As one court has stated, "[t]he publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false." [24] Fault, in other words, not only consists of carelessness but is evidenced by the resulting falsity. Second, a jury is going to be considering evidence as to fault and falsity at the same time, and inevitably the facts found as to one will bear on the other. To tell a jury that one party carries the burden as to truth but the other carries it as to fault is to create unrealistic expectations of what a jury can absorb and apply.[25] The risk is great under the Pennsylvania rule that if the defendant does not prove "truth," it will inevitably be found at fault.

We have seen how this works in the instant case. The instructions on fault followed immediately upon, and were related to, the instructions on falsity. The jurors were told to turn from their consideration of one to their consideration of the other. In exercising their practical, good-sense judgment about whether due care had been

[24] *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir.), *cert. dismissed pursuant to Rule 53*, 454 U.S. 1130 (1981).

[25] Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1236 (1976); Franklin & Bussel, *supra* note 20, at 858. The fact that the burden of proving truth or falsity can make the difference is demonstrated by the *Washington Post*-Tavoulareas case, where it has been reported that one juror was able to convince the other five that the *Post* carried the burden of proving truth and had failed to do so. Brill, *supra* note 23. *See generally Tavoulareas* v. *Washington Post Co.*, 759 F.2d 90 (D.C. Cir. 1985), *reh'g granted*, June 11, 1985.

exercised, therefore, the jurors had uppermost in their minds the conclusions they had just reached about truth or falsity. In this case, the burden was placed by the trial judge on the plaintiff of proving falsity, but when the Pennsylvania rule as announced by the state's Supreme Court is followed in the next case (or in this case on remand), the burden of proving truth will be on the defendant. The jury, if it reaches the issue of fault at all, will have just decided against the defendant on the truth issue; it will have concluded that a defamatory falsehood has been published. Added to the jury's burden of trying to disassociate falsity from fault will be the almost impossible task of recognizing and applying a shift in the burden of proof from the defendant back to the plaintiff. This is more than a jury can reasonably be asked to do, and the resulting risk of unfair defamation judgments is greater than media defendants should be asked to bear.

Additional pragmatic considerations argue for placing the falsity burden on the plaintiff, particularly in those cases where the plaintiff seeks to establish the defendant's culpable state of mind. If the plaintiff is attempting to show that the defendant lacked a reasonable basis for believing the contested statement to be true, as a practical matter he has to prove that the statement is false. If falsity is to be a prerequisite to recovery—which it must be, under *Gertz* and *Firestone*—a great deal of confusion in submitting the case to the jury is going to be avoided by placing the burden of proof as to that issue on the plaintiff. And that plaintiff, after all, is in the best position to know the facts and details about his own activities.[26]

Such considerations as these matter in the courtroom. While statistical proof concerning jury deliberations is not available, both plaintiffs' and defendants' trial at-

[26] *See* Keeton, *supra* note 25, at 1236; Franklin & Bussel, *supra* note 20, at 859.

torneys know from experience that many defamation cases are extremely close in the minds of jurors, and that a number of factors, including who carries the burden of proof, can be decisive in reaching a given result. In a close case, placement of the burden of proof may well be determinative of liability. Thus, by allocating the burden of proof, the trial court effectively "decides each issue of fact which the jury is unable to decide." [27] The practical result is to impose liability without fault in certain cases—a result which, as we have noted, this Court had said the states cannot constitutionally reach even in private person cases.

There are other important First Amendment considerations. For example, if the burden rests on the defendant to prove truth, the pressure increases dramatically to produce any confidential sources who can supply that proof. Yet as numerous state shield statutes attest,[28] there are strong public policy reasons for not forcing the production of confidential sources except where absolutely essential to the resolution of a lawsuit. Moreover, as one state court has pointed out, "no direct consideration appears to have been given [in the extensive litigation to date] to the scope of potential

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[27] E. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 70-71 (1956).

[28] At least half the states have some form of statutory shield protection for confidential sources. *See* Ala. Code § 12-21-142; Ariz. Rev. Stat. § 12-2237 (1981); Ark. Stat. Ann. § 43-917 (1977); Cal. Const. art. 1, § 2(b); Del. Code Ann. tit. 10, §§ 4320-4326; Ill. Rev. Stat. ch. 110, § 8-901 *et seq.*; Ind. Code § 34-3-5-1; Ky. Rev. Stat. § 421.100; La. Rev. Stat. § 45:1454; Md. Cts. & Jud. Proc. Code Ann. § 9-112; Mich. Comp. Law § 767.5a; Minn. Stat. §§ 595.021-595.025 (1981); Mont. Code Ann. §§ 26-1-901 *et seq.*; Neb. Rev. Stat. §§ 20-144-20-147 (1977); Nev. Rev. Stat. § 49.275; N.J. Rev. Stat. § 2A:84A-21; N.M. Stat. Ann. § 38-6-7 (1978); N.Y. Civ. Rights Law § 79-h; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. § 2739.12 (Page 1981); Okla. Stat. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-44.540; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws § 9-19.1-2; Tenn. Code Ann. § 24-1-208.

liability for defamation to which an identified news source is exposed." [29] In other words, even in a case where truth can be proved, the media defendant risks not only revealing confidential sources but exposing them to the same defamation charges that the defendant is already experiencing.[30]

We do not argue, based on the foregoing considerations, for a general application of the *Sullivan* principles to private parties. We do say, however, that in view of the unfairness and risk of self-censorship that will result from the Pennsylvania rule, each citizen may fairly be asked to spell out in his or her complaint precisely what the alleged defamation is and then proceed to prove that the defamatory elements are false. Otherwise, the balance between the protection of private rights and the free flow of information to the public will swing so strongly to one side that all citizens in the democracy will suffer. As one state court has so aptly pointed out, treating only public officials/figures as having assumed the risk of defamation by placing themselves in the public eye misconceives "the role which every citizen is expected to play in a system of participatory self-government. Every citizen, as a necessary part of living in society, must assume the risk of media comment when he becomes involved, whether voluntarily or involuntarily, in a matter of general or public interest." [31]

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[29] *Dairy Stores, Inc.* v. *Sentinel Pub. Co.*, 191 N.J. Super. 202, 465 A.2d 953, 962 (1983), *aff'd*, 198 N.J. Super. 19, 486 A.2d 344 (1985).

[30] Moreover, a serious problem may exist as to whether the confidential source will support the information he previously supplied. As a witness, the source may change his story during discovery, or even lie, either because the repercussions from the information had not been anticipated or to avoid being subjected to liability. *See* Franklin, *supra* note 2, at 279.

[31] *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580, 588 (1974), *cert. denied*, 424 U.S. 913 (1976).

4. *The Resulting Self-censorship by the Press.*

A claimed "chilling effect" on the press from libel litigation has become such a cliche that attorneys tend largely to avoid it—as witness the briefs by Appellants and the other *amici* in this case. But the fact is that even successfully-defended libel litigation has had a chilling effect on news reporting, though some in the industry—perhaps out of professional pride and personal self-esteem—deny it.[32] A contributing editor of the *Columbia Journalism Review*, for example, interviewed more than 150 reporters, editors and media lawyers and "came away convinced that a chill has indeed set in." Massing, *supra* note 9, at 31. He has given numerous examples of how the chill has manifested itself, from the discontinuance of investigative journalism to names and pertinent details being left out of stories. *Id.* One managing editor told him, "[y]ou can never prove that a story didn't get into a paper, but I'm going to say that there are things that should have gotten into our paper that haven't." *Id.* The editor of a small weekly who had been sued seven times in ten years, who had successfully disposed of all of these suits but had gone "broke" in the process, and who had spent an average of one day a week on court-related matters, told the author, "I'm not as aggressive as I used to be." *Id.* at 34. Many other examples are given.[33]

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[32] Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 Mont. L. Rev. 71, 87 (1983); Friendly, *Investigative Journalism Is Found Shifting Goals*, N.Y. Times, Aug. 23, 1983, at 8, col. 1 ("reporters or television news directors do not openly discuss the chances they do not take").

[33] Of course, the now-familiar story of the *Alton* (Ill.) *Telegraph* (cir. 38,000) and its $1.4 million settlement of a $10.5 million libel suit need not be repeated here. Suffice it to say that today, the *Telegraph* "doesn't produce the kind of investigations that once led to the resignation of two Illinois Supreme Court judges for accepting gifts of stock." Curley, *How Libel Suit Sapped The Crusading Spirit Of A Small Newspaper*, Wall St. J., Sept. 29, 1983, at 1, col. 1.

This Court recognized in *Sullivan*, 376 U.S. at 279, that requiring the media to prove the truth of reported facts would lead to self-censorship. Publishers, the Court noted, would avoid the publication of controversial articles because they would be fearful of not being able to prove the truth of their statements. But precisely the same reasoning is applicable to stories about private persons. The fear does not relate to the nature of the person being written about but to the possibility of a lawsuit and the inability to prove in a court of law, by whatever legal standard is applicable, that each element of the story is true.

Both large media and small would be at a disadvantage if the added burden of proof under the Pennsylvania rule were imposed on them.

Large media, such as national television networks and newspapers in large cities, will normally have attorneys available to check questionable or borderline stories. Attorneys are notoriously conservative in close cases, finding it easier to say "no" than to risk even a winnable lawsuit.[34] Therefore, the decision may well be to change or even kill a story rather than risk the time and expense of a possible lawsuit, even if the press is confident of the truth of the story. This will be particularly so, however, if the press has to *prove* truthfulness, and even more particularly truthfulness as to all possible interpretations of the story.

If stories are printed and the resulting lawsuits reach trial, large media appear to juries to be corporate, deep-pocket defendants that elicit no sympathy or understanding. It would simply be ignoring reality not to recognize that today, more than in most periods of our history, there is an animosity toward the press. Whether this is because journalists are regarded as arrogant, the media

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[34] *See* examples in Anderson, *supra* note 9, at 431-432.

appear to be biased, or for whatever reason, juries are reflecting a general community hostility to the press, and their verdicts are reflecting this attitude.[35] Whether or not such attitudes are justified, if rules of law allow them to be translated into unjustified jury verdicts, the public will be the eventual loser.

Small media, on the other hand, are most likely to become embroiled in private person litigation; it is the small town dailies or weeklies, for example, that report more often about private persons and that therefore run the greater risk by virtue of the sheer number of stories printed. Yet small media normally do not have attorneys immediately at hand to protect them by reviewing such stories prior to publication.

This fact has particularly serious consequences under the Pennsylvania rule. In a case where the burden of proving falsity is on the plaintiff, any editor who is confident of the truth of a story will probably release it, even if it involves a controversial subject. But if the burden is the other way, a wholly different set of considerations comes into play. The question then becomes not whether the story is true, but whether the press can *prove*, as a matter of law, that it is true. How will the hearsay rule apply, if at all? Will the evidence relied upon be deemed legally admissible? Can witnesses in

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[35] *See, e.g.* Goodale, *The Tavoulareas Jury Verdict Provides a Chilling Lesson for the Press*, 1 Com. Law 6 (No. 3, 1983); Franklin, *supra* note 9, at 8-10. The trend toward trial rather than summary judgment, larger jury awards, larger legal fees in libel cases, and larger costs of settlement, have all been well documented. *See, e.g.*, Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 6-7, 13, 14 (1983). For a recent study of one jury's attitude toward a media defendant in a libel case, see LDRC Bulletin No. 14, 1, 6-7, 9-10 (1985).

In an entirely different context, this Court has decided a case in part because of "the propensity of juries to award excessive damages for defamation." *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 64 (1966).

support of the story be subpoenaed, particularly if they are located out of town? Can the testimony of old or unavailable witnesses be preserved? Suppose a witness is deceased? What are the rules as to confidential sources? These and a myriad of other questions will face the editor without the aid of an attorney. The practical result may well be to avoid the whole problem by killing the story.

Under the Pennsylvania rule, the time it takes to defend a libel action, the costs and diversion of resources for that defense, and the possibility of large jury awards would, along with all of the problems of affirmatively proving the truth of the defamatory statements, amount to a combination of publication disincentives that many media could not bear. The impact would be particularly burdensome on small media.

Large media obtaining copy from wire services and small media receiving copy from free-lancers will have special problems. Under Pennsylvania law—as in many other jurisdictions[36]—it is no defense that a third party made the defamatory statement and that the defendant merely repeated or otherwise republished it. The defendant is subject to the same liability as if it had originally

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[36] Restatement (Second) of Torts § 578 (1976). For example, unless a special privilege applies, if a defendant publishes the fact that X said that Y committed a crime, it is not enough for the defendant to prove that X made the statement; it must prove that Y *did* commit the crime. L. Eldredge, *Law of Defamation* § 67, at 331 (1978); *see generally Lawrence* v. *Bauer Pub. & Printing Ltd.*, 89 N.J. 451, 446 A.2d 469, 474, *cert. denied*, 459 U.S. 999 (1982); *Medico* v. *Time, Inc.*, 643 F.2d 134, 137-139 (3d Cir.) (discussing "fair report" exception), *cert. denied*, 454 U.S. 836 (1981).

For examples of how significant this can be when the standard is simple negligence, as opposed to actual malice, *see* LaRue, *Living With* Gertz: *A Practical Look at Constitutional Libel Standards*, 67 Va. L. Rev. 287 (1981).

published the defamation.[37] If the burden is on the newspaper to prove the truth of a story received from a news agency or a syndicate covering remote persons or events, for example, there may be serious impediments to the paper's ability to discover and prove truth, particularly where it alone is sued. That there may be ultimate vindication for the newspaper in no way diminishes the chilling effect that this cumbersome and costly procedure will have on the newspaper in the meantime.[38]

We respectfully submit that it is precisely because the malice standard does *not* apply to private persons that the media need the protection accorded by having the burden of proving falsity on the plaintiff. The higher standards of fault that are required when the media defames a public person are no longer applicable; simple negligence will suffice, and, as we have seen, this is in any event an illusory standard of protection, particularly given the almost unlimited definition of defamation in most states.[39] If the media, protected only by the simple

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[37] *Medico* v. *Time, Inc.*, 643 F.2d at 134; *Lal* v. *CBS, Inc.*, 551 F. Supp. 356, 361 (E.D. Pa. 1982), *aff'd.*, 726 F.2d 97 (3d Cir. 1984).

[38] It is no answer that media defendants are covered by insurance. First, it has been estimated that a quarter of all newspapers and broadcasters are not even insured. Anderson & Murdock, *Effects of Communications Law Decisions on Daily Newspaper Editors*, 58 Journalism Q. 525 (1981); Kupferberg, *Libel Fever*, Colum. Journalism Rev., Sept./Oct. 1981, at 36, 39; Franklin, *supra* note 2, at 265. Second, even for those that are insured, the possibility of an adverse claims history in the future and insurers' use of "deductibles and "retentions" mean that the threat of lawsuits remains a formidable one. *Id.* at 274-275.

[39] The ad hoc and often irrational nature of jury verdicts under the ephemeral negligence standard has led to a situation where "the very threat of protracted litigation along with frequent substantial damage awards will be sufficient to chill aggressive reporting and thereby impede the flow of information to the public." Bloom, *Proof of Fault in Media Defamation Litigation*, 38 Vand. L. Rev. 247, 253 (1985).

negligence standard, must also prove truth, the bias toward recovery will have shifted so significantly that a chilling effect is inevitable. This is the ultimate, practical result of the rule here at issue. It is a result not in the public interest, and not in keeping with the First Amendment. The Court should disapprove it.

CONCLUSION

For these reasons and those expressed by Appellants and the other *amici*, we urge the Court to reverse the decision and judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX

APPENDIX A

DESCRIPTION OF AMICI

1. A.H. Belo Corporation—The A.H. Belo Corporation, a Texas corporation, publishes *The Dallas Morning News*, a daily newspaper in Dallas, Texas.

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Thomas S. Leatherbury
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36th Floor
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2. American Broadcasting Company—The American Broadcasting Company, a division of American Broadcasting Companies, Inc., is a New York corporation which owns and operates a national television network (ABC), national radio networks, television and radio broadcasting stations, and, through various subsidiaries, also publishes magazines and books.

Sam Antar
Vice President & General Attorney
American Broadcasting Company
7 West 66th Street
New York, New York 10023

3. American Society of Newspaper Editors—The American Society of Newspaper Editors ("ASNE") is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

Richard M. Schmidt, Jr.
Cohn & Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorneys for American Society of
Newspaper Editors

4. Anniston Star Consolidated Publishing Company—The Anniston Star Consolidated Publishing Company is an Alabama corporation which publishes the *Anniston Star* and *Talladega Daily Home* daily newspapers and several weekly newspapers, all in the State of Alabama.

James C. Barton
Johnston, Barton, Proctor, Swedlaw & Naff
1100 Park Place Tower
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Birmingham, Alabama 35203
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5. A.S. Abell Publishing Company—The A.S. Abell Publishing Company is a Maryland corporation which publishes The Baltimore *Sun* and The Baltimore *Evening Sun* newspapers in Baltimore, Maryland.

Douglas D. Connah, Jr.
Venable, Baetjer & Howard
1800 Mercantile Bank & Trust Building
Two Hopkins Plaza
Baltimore, Maryland 21201
Attorneys for A.S. Abell Publishing Company, publisher of The Baltimore *Sun* and the Baltimore *Evening Sun*

6. Associated Press—The Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York, and engages in gathering and distributing news of local, national and international importance to its member newspaper and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news.

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Rogers & Wells
200 Park Avenue
New York, New York 10166
Attorneys for the Associated Press

7. Associated Press Managing Editors—The Associated Press Managing Editors is a separate membership organization which includes more than 600 editors of newspaper members of the Associated Press, which gathers news worldwide for dissemination of 1,330 newspapers and 3,300 broadcast stations in the United States.

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8. Bergen Record Corporation—The Bergen Record Corporation is a New Jersey corporation which publishes *The Record* and *The Sunday Record* newspapers from Hackensack, New Jersey.

Peter G. Banta
Winne, Banta, Rizzi, Hetherington & Basralian
22 East Salem Street
Hackensack, New Jersey 07602
Attorneys for Bergen Record Corporation

9. Cable News Network, Inc.—Cable News Network, Inc., a subsidiary of Turner Broadcasting System, Inc., is the nation's only 24-hour television network, reaching more than 34 million homes domestically and many other outlets overseas.

Robert W. Ross, Esq.
Vice President and General Counsel
Turner Broadcasting System, Inc.
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

Stuart F. Pierson, Esq.
William E. Kennard, Esq.
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
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Washington, D.C. 20036
Attorneys for Cable News
Network, Inc.

10. Central Newspapers, Inc.—Central Newspapers, Inc., publishes the following daily newspapers: *Indianapolis Star*, *Indianapolis News*, *Arizona Republic*, and *Phoenix Gazette*.

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Barnes & Thornburg
1313 Merchants Bank Building
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Attorneys for Central Newspapers, Inc.

11. Chronicle Publishing Company—The Chronicle Publishing Company is a Nevada corporation with its principal place of business in San Francisco, California, where it publishes the *San Francisco Chronicle*, a daily newspaper.

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Maria L. Joseph
Cooper, White & Cooper
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Attorneys for the Chronicle Publishing
Company

12. The Copley Press, Inc.—The Copley Press, Inc., publishes *The San Diego Union* and *The Tribune* and nine other daily newspapers in California and Illinois with a combined circulation of more than 700,000.

Harold W. Fuson, Jr.
Vice President and General Counsel
The Copley Press, Inc.
7776 Ivanhoe Avenue
La Jolla, California 92038-1530

13. The Courier Journal and Louisville Times Company—The Courier Journal and Louisville Times Company publishes *The Courier Journal* and *The Louisville Times*, which are daily newspapers published in Louisville, Kentucky.

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2710 Citizens Plaza
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Louisville Times Company

14. Deseret News Publishing Company—The Deseret News Publishing Company, a Utah corporation, publishes *The Deseret News*, an evening daily newspaper in Salt Lake City, Utah.

Wilford W. Kirton, Jr.
Kirton, McComkie & Bushnell
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Salt Lake City, Utah 84111
Attorneys for the Deseret News Publishing
Company

15. *Des Moines Register*—The *Des Moines Register* is a daily newspaper in Des Moines, Iowa, and is circulated throughout the State of Iowa by the Des Moines Register and Tribune Company, an Iowa corporation.

16. *Detroit Free Press* *—The *Detroit Free Press* is a daily newspaper published in Detroit, Michigan, and distributed throughout the State of Michigan by Knight-Ridder Newspapers, Inc., a Florida corporation

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Honigman, Miller, Schwartz and Cohn
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Attorneys for the *Detroit Free Press*

17. Donrey, Inc.—Donrey, Inc. is a Nevada corporation, which does business as Donrey Media Group, publishes 53 daily newspapers and 56 non-daily newspapers, and owns and operates 8 broadcast stations and 6 cable television companies in 20 states. Some of the daily newspapers published by the Donrey Media Group include: the *Las Vegas* (Nev.) *Review-Journal*, the *Southwest Times-Record* in Ft. Smith, Arkansas, the *Pomona* (Calif.) *Daily Bulletin*, the *Norman* (Okla.) *Transcript*, the *Sherman* (Tex.) *Democrat*, the *Hawaii Tribune Herald* in Hilo, Hawaii, the *Minot* (N.D.) *Daily News*, the *Macon* (Mo.) *Chronicle-Herald*, the *Picayune-Item* in Picayune, Mississippi, the *Glasgow* (Ky.) *Daily Times*, the *Columbia* (Tenn.) *Daily Herald*, the *Aberdeen* (Wash.) *Daily World* and the *Kent* (Wash.) *Daily News Journal*. Donrey Media Group also owns and operates radio stations KEXO-AM and KLDR-FM in Grand Junction, Colorado.

George O. Kleier
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David M. Olive
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Donrey Media Group
920 Rogers
Ft. Smith, Arkansas 72901

18. Evening Post Publishing Co.—The Evening Post Publishing Co., a South Carolina corporation, publishes *The Evening Post* and *The News and Courier*, which are daily newspapers published in Charleston, South Carolina and distributed throughout the State of South Carolina.

D.A. Brockington, Jr.
Brockington, Brockington & Smith
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Attorneys for The Evening Post
Publishing Co.

19. Gaithersburg Publishing Company, Inc.—Gaithersburg Publishing Company, Inc. is a Maryland corporation which publishes the following weekly newspapers in Maryland: *Olney Courier-Gazette*, *The Gaithersburg Gazette*, *The Gazette*, *The Rockville Gazette*, *The Damascus Courier-Gazette*, and *The Mt. Airy Courier-Gazette*.

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Company

20. Globe Newspaper Company—Globe Newspaper Company publishes *The Boston Globe*, a daily newspaper in Boston, Massachusetts.

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21. Great Falls Tribune Company—Great Falls Tribune Company publishes *The Great Falls Tribune*, a daily newspaper in Great Falls, Montana.

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22. Gulf Publishing Company, Inc.—The Gulf Pulishing Company, Inc., a Mississippi corporation, publishes: (i) *The Gulport-Biloxi Daily Herald*, an evening daily newspaper published in Gulfport, Mississippi; and (ii) *The South Mississippi Sun*, a morning daily newspaper published in Gulfport, Mississippi.

W. Joel Blass
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23. The Hearst Corporation—The Hearst Corporation —more than 125 companies including newspapers, magazines, books, broadcasting and cable communications.

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Attorneys for The Hearst Corporation

24. The Highland Publishing Company—Highland Publishing Company is a Texas corporation with its principal place of business in Marble Falls, Texas, where it publishes: (i) *The Highlander*, the largest circulation (9,561) weekly newspaper in the State of Texas, and (ii) *Texas Fish and Game*, a monthly magazine.

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25. The Houston Chronicle Publishing Company—The Houston Chronicle Publishing Company is a Texas Corporation which publishes *The Houston Chronicle*, a daily newspaper in Houston, Texas.

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26. Houston Post Company—The Houston Post Company publishes *The Houston Post*, a daily morning newspaper published in Houston, Texas.

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27. Journal Publishing Company—The Journal Publishing Company, a New Mexico corporation, is the publisher of *The Albuquerque Journal*, a seven-days-a-week newspaper in Albuquerque, New Mexico, which is the largest circulation daily newspaper in the State of New Mexico.

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Albuquerque, New Mexico 87110
Attorneys for Journal Publishing Company

28. Landmark Comunications, Inc.—Landmark Communications, Inc. is a Virginia corporation which publishes *The Virginian-Pilot* (each morning, Monday through Friday), *The Ledger-Star* (each afternoon, Monday through Friday), and a combined newspaper, *The Virginian-Pilot and The Ledger-Star* (on Saturday and Sunday mornings), which are circulated primarily in Norfolk, Portsmouth, Virginia Beach, Chesapeake and

Suffolk, Virginia, and in surrounding counties in Virginia and North Carolina. Through subsidiaries, Landmark Communications, Inc., also publishes: (i) the Greensboro *Daily News and Record*, an all-day, seven-days-a-week newspaper published from Greensboro, North Carolina; (ii) the *Roanoke Times & World News*, all-day, seven-days-a-week newspaper published from Roanoke, Virginia; (iii) 4 daily, 3 tri-weekly, 6 semi-weekly, 14 weekly, 2 free weekly, 22 shopping, and 8 special community newspapers and publications in California, Florida, Indiana, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Mexico, Pennsylvania and Virginia; (iv) 3 weekly entertainment publications in Hampton Roads, Virginia; Richmond, Virginia; and Greensboro/Winston-Salem/High Point, North Carolina. Finally, Landmark Communications, Inc., also owns and operates television stations in San Jose, California (KNTV) and Las Vegas, Nevada (KLAS-TV), radio stations WTAR and WLTY-FM in Norfolk, Virginia, and The Weather Channel, Inc., a 24-hour weather service for cable television systems.

Mr. Louis Ryan
Vice President, Secretary and Counsel
Landmark Communications, Inc.
150 W. Brambleton Avenue
Norfolk, Virginia 23501

Conrad M. Shumadine
Wilcox & Savage
1800 Sovran Center
Norfolk, Virginia 23501
Attorneys for Landmark Communications, Inc.

29. *Los Angeles Times*—The *Los Angeles Times*, a division of The Times Mirror Company, is a daily newspaper published in Los Angeles, California; it also syndicates newspaper features and is the joint owner of a news service.

William A. Niese
Vice President and General Counsel
Jeffrey S. Klein
Staff Counsel
Los Angeles Times,
a division of the Times Mirror Comany
Times Mirror Square
Los Angeles, California 90053

30. McClatchy Newspapers—McClatchy Newspapers, a California communications company since 1857, owns and operates ten newspapers in California, Washington and Alaska with a total circulation of over 600,000, including *The Sacramento Bee*, *The Fresno Bee*, *The Modesto Bee*, the *Tri-City Herald*, and *The Anchorage Daily News*.

Gary B. Pruitt
Counsel
McClatchy Newspapers
2100 "Q" Street
Sacramento, California 95852

31. The Miami Herald Publishing Company *—The Miami Herald Publishing Company is a division of Knight-Ridder Newspapers, Inc., a Florida corporation, and publishes *The Miami Herald*, a daily newspaper in Miami, Florida, which is distributed throughout the State of Florida.

Richard J. Ovelmen
Samuel A. Terilli
Office of the General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101

32. Minneapolis Star and Tribune Company—Minneapolis Star and Tribune Company is a Minnesota corporation which publishes *The Minneapolis Star and Trib-*

une, a seven-days-a-week newspaper which circulates throughout the State of Minnesota.

Norton L. Armour
General Counsel
The Minneapolis Star and Tribune
429 Portland Avenue
Minneapolis, Minnesota 55488

32. National Association of Broadcasters—The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated association of radio and television broadcast stations and networks. NAB membership includes more than 4500 radio stations, 850 television stations, and the major commercial broadcast networks. Among NAB's members are more than 160 radio and television broadcasters in the Commonwealth of Pennsylvania.

Henry L. Baumann
Steven A. Bookshester
National Association of Broadcasters
1771 "N" Street, NW
Washington, D.C. 20036

34. News and Observer Publishing Company—The News and Observer Publishing Company is a North Carolina corporation whose principal place of business is located in Raleigh, Wake County, North Carolina. The company publishes *The News & Observer*, *The Raleigh Times*, and 18 other newspapers throughout North Carolina and South Carolina.

H. Hugh Stevens, Jr.
Sanford, Adams, McCullough & Beard
414 Fayetteville Street Mall
Raleigh, North Carolina 27602
Attorneys for the News and Observer
Publishing Company

35. News-Journal Corporation—The News-Journal Corporation, a Florida corporation, publishes the *Daytona Beach Morning Journal*, the *Daytona Beach Evening News*, and the *Sunday News Journal*, all of which are published in Daytona Beach, Florida.

Thomas T. Cobb
Cobb & Cole
150 Magnolia Avenue
Daytona Beach, Florida 32015
Attorneys for News-Journal Corporation

36. North Carolina Press Association, Inc.—The North Carolina Press Association, Inc. (the "NCPA") is a voluntary membership association chartered as a non-profit corporation under the laws of North Carolina. Its principal place of business is located at Suite 1100, 5 West Hargett Street, Raleigh, North Carolina 27602. Its membership consists of approximately 55 daily newspapers and 120 non-daily newspapers published throughout North Carolina.

H. Hugh Stevens, Jr.
Sanford, Adams, McCullough & Beard
414 Fayetteville Street Mall
Raleigh, North Carolina 27602
Attorneys for the North Carolina Press
Association

37. North Dakota Newspaper Association—The North Dakota Newspaper Association is a voluntary membership association chartered as a non-profit corporation under the laws of North Dakota. Its principal place of business is located at Box 8137, University Station, Grand Forks, North Dakota 58502. Its membership consists of every newspaper published from the State of North Dakota, including 10 daily newspapers and 87 non-daily newspapers.

Jack McDonald, Jr.
Wheeler, Wolf, Peterson, Schmitz,
McDonald & Johnson
220 North 4th Street
Bismarck, North Dakota 58502-2056
Attorneys for North Dakota Newspaper
Association

38. Oklahoma Publishing Company—The Oklahoma Publishing Company publishes *The Daily Oklahoman*, *The Saturday Oklahoman & Times* and *The Sunday Oklahoman*, all of which are published in Oklahoma City, Oklahoma.

Michael Minnis
Pierson, Ball & Dowd
Suite 1310
First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102
Attorneys for Oklahoma Publishing Company

39. Omaha World-Herald Company—The Omaha World-Herald Company publishes the *Omaha World-Herald*, a daily newspaper in Omoha, Nebraska.

James L. Koley
McGill, Koley, Parsonage & Lanphier, P.C.
Suite 300
10010 Regency Circle
Omaha, Nebraska 68114
Attorneys for Omaha World-Herald Company

40. Radio-Television News Directors Association ("RTNDA")—RTNDA is a professional organization of more than 2000 news directors and others who are active in the supervising, reporting, and editing of news and public affairs programming on radio and television, both broadcast and cable.

J. Laurent Scharff
Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, D.C. 20036
Attorneys for Radio-Television News
Directors Association

41. Richmond Newspapers, Inc.—Richmond Newspapers, Inc., publishes a morning newspaper, the *Richmond Times-Dispatch*, and an evening newspaper, *The Richmond News Leader* (combined circulation in excess of 250,000 and Sunday morning circulation 230,878), which are distributed in 21 cities and 71 counties throughout the Commonwealth of Virginia.

Alexander Wellford
Christian, Barton, Epps, Brent
& Chappell
1200 Mutual Building
Richmond, Virginia 23219
Attorneys for Richmond Newspapers, Inc.

47. *Salt Lake Tribune*—The *Salt Lake Tribune* is a seven-days-a-week morning newspaper published in Salt Lake City, Utah, by Kearns-Tribune Corporation, a Utah corporation.

Donald R. Holbrook
D. Miles Holman
Jones, Waldo, Holbrook & McDonough
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for the *Salt Lake Tribune*

43. *San Jose Mercury News**—The *San Jose Mercury News* is a daily newspaper published in San Jose, California by Knight-Ridder Newspapers, Inc., a Florida corporation.

Edward P. Davis, Jr.
Rankin, Oneal, Center, Luckhardt,
Lund & Hinshaw
Suite 300
2 West Santa Clara Street
San Jose, California 95115
Attorneys for *San Jose Mercury News*

44. Seattle Times Company—Seattle Times Company is a Delaware corporation with its principal place of business in Seattle, Washington where it publishes *The Seattle Times*, a daily newspaper.

P. Cameron DeVore
Davis, Wright, Todd, Riese & Jones
4200 Seattle First National Bank Building
Seattle, Washington 98154
Attorneys for Seattle Times Company

45. *The Tampa Tribune—The Tampa Tribune* is a daily newspaper in Tampa, Florida, published by The Tribune Company Inc., which is a subsidiary of Media General, Inc.

Gregg D. Thomas
Holland & Knight
600 Florida Avenue
Tampa, Florida 33602
Attorneys for *The Tampa Tribune*

46. Times-Picayune Publishing Corporation—Times-Picayune Publishing Corporation, a Louisiana corporation, publishes *The Times-Picayune/States-Item*, a daily newspaper in New Orleans, Louisiana.

Jack M. Weiss
Rutledge C. Clement, Jr.
Phelps, Dunbar, Marks, Claverie & Sims
Texaco Center
400 Poydras Street, 30th Floor
New Orleans, Louisiana 70130
Attorneys for Times-Picayune Publishing
Corporation

47. Times Publishing Company— The Times Publishing Company is the publisher of the *St. Petersburg Times* and *Evening Independent*, daily newspapers which are published in St. Petersburg, Florida.

George K. Rahdert
Rahdert, Anderson & Richardson
233 Third Street North
St. Petersburg, Florida 33701
Attorneys for Times Publishing Company,
publisher of the *St. Petersburg Times*
and *Evening Independent*

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* These amici are divisions of Knight-Ridder Newspapers, Inc., which is the parent corporation of one of the Appellants, Philadelphia Newspapers, Inc.